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NOTES.

LEGISLATIVE POWER TO TAKE AWAY INTENT IN CRIMINAL CASES.—The State Constitution of Washington contains the following provisions, Art. 1, § 3: "No person shall be deprived of life, liberty or property without due process of law;" and Art. 1, § 21: "The right of trial by jury shall remain inviolate." Rem. and Bal. Code, § 2259 provides that insanity is no defence to a charge of crime, and that whenever in the judgment of the court any person convicted of a crime shall have been, by reason of his insanity unable to comprehend the nature of the act, the court may, in its discretion, direct such person to be confined in one of the state hospitals for treatment.

In the case of *State v. Strasburg*¹ the trial Court had refused to admit evidence tending to prove that the defendant at the time of committing the crime was insane and incapable of understanding the nature and quality of his act, and had charged the jury "that, under the laws of this State, it is no defense to a criminal charge that the person charged was at the time of the commission of the offense unable, by reason of his insanity, idiocy or imbecility, to comprehend

¹ 110 Pac. R. 1020 (1910).

the nature and quality of the act, or to understand that it was wrong."

The Supreme Court of Washington reversed the decision on the grounds that the Code provision contravened Art. 1, § 3 of the Constitution, because (1) criminal intent is an essential element of crime, and Art. 1, § 21, because (2) its effect is to take away from the jury the question of criminal intent.

The Code provision did not merely take away that intent required at common law as a necessary ingredient to a crime, but said "the right of trial by jury shall remain inviolate;" that is, everyone who, before the adoption of this Constitution would have possessed a right to trial by jury, will continue to possess such right. So far so good: the defendant in *State v. Strasburg* had a trial by jury. But does such a trial mean merely the placing of twelve figure-heads in a box, or the submitting to them certain evidence long permitted and required at common law which goes to the very root of the defense? It has always been the jury's province to determine, upon proper evidence, whether or not a man charged with an action having for its aim the death of another was insane at the time of committing such action. This is a common law right of the prisoner, if he can prove insanity he cannot be convicted as he would otherwise have been convicted, because intent was lacking to commit the crime. Such question for the jury seems to have been an inherent part of the functions. But is it part of the "due process of law" required by the Constitution before a person shall be deprived of life, liberty or property? Does Art 1, § 3 apply to "due process of law" as known before the adoption of the Constitution, or as changed by statutes after such adoption? The Court says the constitution itself answers this question in Art. 1, § 32: "A frequent recurrence to fundamental principles is essential to the security of individual rights."

If abstracting criminal intent from the elements of crime conflicts with a provision that the right of trial by jury shall remain inviolate, it also contravenes the due process of law clause, for such trial by jury is, and always has been in certain cases (of which, says the Court, this is one), part of the due process of law. The statement in *State ex rel. Mullen v. Doherty*,² "The effect of the declaration of the Constitution is to provide that the right of trial by jury as it existed in the territory at the time the Constitution was adopted should be continued unimpaired and inviolate" is familiar law.

As against the constitutionality of the Code provision appear the following general principles: (a) Prior to the adoption of the Constitution a defendant's right to prove his insanity at the time of committing the act was as perfect as his right to prove that his physical person did not commit the act or set in motion a chain of events resulting in the act. (b) Due process of law requires that

² 16 Wash. 382.

a party shall be properly brought into court and that he shall have an opportunity when there, to prove any fact which according to the Constitution, the Statutes and the usages of the common law, would be a protection to him or his property. (c) Any method of procedure which a Legislature may, in the uncontrolled exercise of its power, see fit to enact, having for its purpose the deprivation of a person of his life, liberty or property, is in no sense the process of law designated and imperatively required by the Constitution.³ (d) The Legislature may not change the rules of evidence as to deprive parties of such a jury trial as the Constitution reserved to them. The rules of evidence may be so changed as to infringe the constitutional right of trial by jury, or they may be so changed as not to infringe it. The Legislative power of regulating evidence, like all other Legislative power, is limited by every right guaranteed by the Constitution, and to say the Legislature may regulate evidence is merely to say that they may make any law on any subject that infringes no Constitutional right. Otherwise it might be said that as jury trial is a remedy, and remedies may be altered by the Legislature, the Legislature may alter jury trial to any extent.⁴ (e) Of what value is the right to "appear and defend" if the Legislature can clog it with conditions and restrictions which substantially nullify the right? How can due process of law be interpreted if the Legislature can alter the Constitutional meaning of that phrase?

The idea of the Legislature was, that because of modern humane methods in treating those convicted of crime, there remains no longer any reason for considering the element of will on the part of those who commit prohibited acts when their guilt is being determined for the purpose of putting them in the criminal class for restraint and treatment. Such legislation, says Rudkin, C. J.,⁵ is "a result of the dangers which have been multiplied by the absurd length to which the defense of insanity has been allowed to go under the fanciful theories of incompetent and dogmatic witnesses, who have brought discredit on science and made the names of experts unsavory in the community. No doubt many criminals have escaped justice by the weight foolishly given by credulous jurors to evidence which their common sense should have disregarded. But the remedy is to be sought by correcting false notions and not by destroying the safeguards of private liberty."

It is submitted that the above conceptions may be answered. "Due process of law" means that a man is to be tried, as every other man is tried, in accordance with the law of the land in the State where he is charged with the crime. "Due process of law" does not mean the general body of the law, common and statute, as it was at the time the Constitution took effect, but rather means

³ *Witherbee v. Supervisors*, 70 N. Y. 228, and *State v. Billings*, 55 Minn. 467.

⁴ *King v. Hopkins*, 57 N. H. 334.

⁵ *State v. Strasburg* (*supra*).

that there must be a competent tribunal to pass on the subject matter; notice, actual or constructive; an opportunity to appear and produce evidence, to be heard in person or by counsel; and if the subject matter involve the determination of the personal liability of the defendant, he must be brought within the jurisdiction by service of process within the State or by his voluntary appearance.* Such "due process" according to *State v. Strasburg* would always be forced to remain exactly as it was at the adoption of the Constitution. The provision of the Legislature in this case must have been, therefore, part of the law of the land, and the only question is, if it took away the accused's right to trial by jury.

That the right of trial by jury as heretofore enjoyed shall remain inviolate, means that all the substantial incidents and consequences which pertain to the right of trial by jury are beyond the reach of legislation, and these are (1) that the jury must be twelve men, indifferent between the prisoner and the Commonwealth, and to secure this challenge must be allowed; (2) the jury must be summoned from the vicinage where the crime is supposed to have been committed, as this gives the accused, on the trial, the benefit of his own good character and standing with his neighbors; (3) the jury must unanimously concur in the verdict, and (4) the jurors must be left free to act in accordance with the dictates of their own judgment.⁷ The provision that trial by jury shall remain inviolate applies to the jury as such and cannot be interpreted as the relation of the jury to newly created personal disabilities of the prisoner. The latter must be regulated either by common law or the Legislature, and after such personal disabilities are thus determined, the prisoner is entitled to his trial by jury. All that the Constitution aims to do is to retain to the citizens of the State, trial in the form of a judge and jury in proper cases, and where questions of fact, so considered by law, must be submitted to the jury.

A large number of cases, though not deciding this Constitutional point because it was not raised, have held that the Legislature in statutory crimes may take away the intent. Now insanity as a defense only goes to negative intent, or, at most, whenever a man committed a crime, while insane, at common law he was not treated as he would have been if not insane, and so even under this supposition, as the question of insanity must be less than that of intent, the Legislature can take it away.

The substance of the opinion of the court is found in the following statement of Parker, J.: "The right of trial by jury must mean that the accused has the right to have the jury pass upon every substantive fact going to the question of his guilt or innocence. Otherwise the provision of our Constitution * * * would be rendered void." While admitting the absolute truth of this statement we submit that the Legislature may change facts which constitute guilt or innocence.

T. W. B. 3d.

* 8 Cyc. 10, 83 B.

⁷ *State v. Harvey*, 168 Mo. 167.